SUPREME COURT OF THE UNITED STATES.

No. 399.

EDWARD C. BATES, PLAINTIFF IN ERROR,

vs.

THE EQUITABLE FIRE AND MARINE INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

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1 At a Circuit Court of the United States for the first circuit and district of Rhode Island, begun and holden at Providence, within and for said district, on the sixteenth day of November, A. D. 1868. (the fifteenth being on Sunday) before Hon. Nathan Clifford, associate justice, Sup. Court, U. S.; Hon. J. R. Bullock, district judge, U. S. for se'nd dist.; Wingate Hays, esq., U. S. district attorney; Robert Sherman, U. S. marshal; Henry Pitman, clerk.

In the record of the proceedings of said court, among others is the following, to wit:

2 EDWARD C. BATES
vs.
EQUATABLE FIRE AND MARINE INSURANCE CO.

Be it remembered that at the June term, 1865, of said court, the following writ and declaration were filed:

Writ.

RHODE ISLAND DISTRICT, *ss*:

The President of the United States of America, to the marshal of said district or to his deputy, greeting:

We command you to summon the Equitable Fire and Marine Insurance Company, a corporation created by the general assembly of the State of Rhode Island, and doing business in Providence, in said district, and a citizen of said State, if it may be found in your district, to answer the complaint of Edward C. Bates, of Boston, in the commonwealth of Massachusetts, a citizen of said State, at
3 the next Circuit Court, to be holden at Newport, within and for the Rhode Island district, on the fifteenth day of June next ensuing the date hereof, in an action of the case for that the def't hath broken their promises and undertakings to the pl'ff made, as by the declaration to be filed in court will be fully set forth, to the damage of the pl'ff four thousand dollars. Hereof fail not and make true return of this writ with your doings thereon.

Witness, the Hon. Salmon P. Chase, our chief justice at Newport, this twenty-fourth day of May, A. D. 1865.

[SEAL.] HENRY PITMAN, *Clerk.*
C. S. BRADLEY,
Pl'ff's Attorney and surety for costs.

Marshal's return.

RHODE ISLAND DISTRICT, *ss*:

MAY 25TH, 1865.

4 By virtue hereof I have summoned the within Equitable Fire and Marine Insurance Company, by giving in hand a true

and attested copy of this writ to Thomas G. Turner, president of the within-named insurance company, as commanded.

R. SHERMAN, *U. S. Marshal.*

Service	$2 00
31 miles travel	1 86
Copy	50
Stamps	55
	$4 91

U. S. Circuit Court, June term, 1865.

Declaration.

RHODE ISLAND DISTRICT:

Edward C. Bates, of Boston, in the commonwealth of Massachusetts, a citizen of said State, complains of the Equitable Fire and Marine Insurance Company, a corporation created by the general assembly of the State of Rhode Island, and doing business in
5 Providence, in said State, duly summoned by the marshal in a plea of the case, for that whereas, one William D. Philbrick, heretofore, to wit, on the 11th day of October, 1861, at the city of Providence, State and district of Rhode Island, caused to be made a certain policy of insurance, purporting thereby and containing therein that the said Philbrick did make insurance and cause himself to be insured in the sum of 3,000 dollars on a stock of sugars, raw, wrought and in process, contained in the frame building with composition roof, occupied by the said assured for refining sugar, situate on Sargent's wharf, in Boston, commonwealth of Massachusetts, with liberty for other insurance without notice until requested, against all loss or damage to the same by fire, originating in any cause except invasion, foreign enemies, civil commotions, riots, or military or usurped
6 power, whatsoever, for and doing the term of one year, commencing the risk on the 11th day of October, 1861, at noon, and to continue until the 11th day of October, 1862, at noon, the said loss to be estimated according to the true and actual value of said property at the time such loss might happen. And by a certain agreement in said policy contained, it was provided that if the assured should sell the aforesaid property, insured as aforesaid, before the expiration of the policy, a portion of the premium should be repaid upon receiving notice of such sale before the occurrence of any loss, or the policy should continue for the benefit of the purchaser if the insurer gave consent thereto, to be evidenced by a certificate of the fact or by endorsement on said policy.

Of which policy the said defendants afterwards, on the 11th
7 day of October, 1861, at said Providence, had notice, and in consideration that the said Philbrick had then and there paid to the said def'ts the premium of ninety dollars, according to the tenor of said policy, the said def'ts then and there became insurers

of said property for the term aforesaid, according to the tenor and effect of said policy, for the sum of 3,000 dollars.

And the pl'ff further saith that on the 11th day of October, 1861, the said Philbrick was interested as owner in said property to the extent of all the sums insured thereon, including the said 3,000 dollars, and continued to have such interest until the 23d day of November, 1861, at which time the said Philbrick, for a full and valuable consideration, sold and delivered to the plaintiff all and every the
stock of sugars in said policy mentioned, and at the same time
8 for a like consideration assigned said policy and delivered the same with said sugars to the plaintiff for his own use and benefit as the purchaser of said sugars, all of which the said defendants then and there had notice.

And the pl'ff avers that the fact of such sale and delivery of said sugars and of such assignment and delivery of said policy was endorsed thereon on the 23d day of November, 1861, and that the pl'ff at the same day presented said policy to the said def'ts with said endorsement thereon, and that they, the said def'ts, on the 29th day of November, 1861, by Frederick A. Arnold, their secretary, in this behalf duly authorized, endorsed their consent thereto upon said policy and redelivered it to the pl'ff; by force whereof, and in consideration of the premises, said policy, according to the agreement
therein contained as aforesaid, was continued for the sole
9 use and benefit of the pl'ff as purchaser for and during the unexpired portion of the aforesaid term of one year, and the said def'ts undertook to pay the pl'ff said sum of 3,000 dollars if any loss should occur during the term aforesaid, to said sugars within the terms of said policy.

And the pl'ff avers that all and every of said sugars were destroyed by fire on the 24th day of February, 1862, in the aforesaid building, on Sargent's wharf, in Boston aforesaid; that said fire originated from some unknown cause, and not from invasion, foreign enemies, civil commotions, riots, or military or usurped power, whatsoever, and wholly and utterly lost; that the pl'ff at the time of such loss was interested as purchaser, as aforesaid, to the full extent of the sum insured; all of which the said def'ts had due notice and proof;
10 and although the pl'ff has performed all things by virtue of said policy on his part to be performed, and sixty days since the said loss and notice and proof thereof has elapsed, the said def'ts have not paid the pl'ff said sum of 3,000 dollars or any part thereof, though often thereunto requested.

2d count.

And also for that whereas, one Wm. D. Philbrick heretofore, to wit., on the 11th day of October, 1861, at said Providence, caused to be made a certain policy of insurance, and thereby caused himself to be insured for the sum of 3,000 dollars on a stock of sugars, raw, wrought and in process, contained in the frame building with composition roof, occupied by him for refining sugar, and situate on Sar-

gent's wharf, in Boston, commonwealth of Massachusetts, with liberty for other insurance without notice until requested, against
11 all loss or damage by fire originating in any cause, except invasion, foreign enemies, civil commotions, riot, or any military or usurped power, whatever, for and during the term of one year, commencing at noon on the 11th day of October, 1861, and ending at noon on the 11th day of October, 1862, such loss to be estimated according to the true and actual value of said property at the time of the happening of the loss.

And it was stipulated in said policy, that if the said Philbrick should sell said insured property before the expiration of said term, a proportion of the premium should be repaid upon receiving notice of such sale before the occurrence of any loss, or the policy should continue for the benefit of the purchaser if the insurer gave
12 consent thereto by a certificate of the fact, or by an endorsement thereof on said policy. Of which policy of insurance the said defts. afterwards, to wit, on the 11th day of October, 1861, at said Providence, had notice, and in consideration thereof, and of the payment to them by the said Philbrick, of the premium of ninety dollars, according to the tenor of said policy, then and there became insurers of said property for the term aforesaid according to the tenor and effect of said policy, for the sum of 3,000 dollars.

And the plff. avers that on the 11th day of October, 1861, the said Philbrick was interested as owner in said property to the extent of all the sums insured thereon, including said 3,000 dollars and continued to have such interest until the 23d day of November, 1861, when the said Philbrick, for a full and valuable consideration,
13 sold and delivered to the plff. all and every the stock of sugar in said policy mentioned. And at the same time for a like consideration, by his endorsement in writing on said policy, made the same payable, in case of loss, to the plff. And the said defts. thereafterwards, to wit, on the 29th day of November, 1861, at said Providence, by their endorsement in writing on said policy, signed by Frederick W. Arnold, their secretary in that behalf, duly authorized gave their consent to the above recited endorsement of the said Philbrick. All of which the said defts. then and there had notice, and in consideration of the premises, said policy was continued according to the stipulation therein contained as aforesaid, for the sole use and benefit of the plff. as purchaser of said insured property and assignee of said policy as aforesaid, for and
14 during the unexpired portion of said term, and the said deft. undertook to pay to the plff. said sum of 3,000 dollars in case of loss during such term, to said sugars, within the terms of said policy. And the plff. avers that all and every the said sugars were destroyed by fire on the 24th day of February, 1862, in the building aforesaid on Sargent's wharf, Boston, and wholly lost. That said fire originated from some cause unknown, and not from invasion, foreign enemies, civil commotion, riot, or any military or usurped power whatever, that the plff. at the time of such loss was interested as purchaser, as aforesaid, of said insured property to the full extent of

the sums insured thereon, including said 3,000 dollars, of all which the said defendants had notice and proof.

15 Yet though the plff. has performed all things on his part required by said policy, and sixty days have elapsed since said loss, notice and proof, the said defts. have not paid said sum of 3,000 dollars or any part thereof, but refused, tho' requested so to do.

And also for that the said deft. corporation, at the time and place aforesaid, were justly indebted to the plff. in one other sum of four thousand dollars for so much money before that time had and secured to the use of the plff., and also for so much money before that time paid, laid out and expended by the plff. to and for the defts. and at their request and instance ; and also for so much money for interest for the forbearance of the plff. at the deft's

16 request, of monies due and owing by the defts. to the plff., then and there promised, in consideration thereof the plff. to pay him said sum of money last mentioned on request.

Yet although requested, the deft. corporation has not paid said sum or any part thereof, but has refused, and still does refuse to pay the same, to the plff's damage of four thousand dollars, as laid in his writ dated the 24th day of May, 1865.

Wherefore he sues by his atty.

C. S. BRADLEY.

And at the same June term, 1865, of said court, was filed the following plea and joinder:

And the said deft. corporation comes and defends the wrong and injury, when &c., and says it never promised in manner and

17 form as said plaintiff has in his said declaration alleged, and of this, &c.

By their attorney, WM. H. POTTER.

And the plff. doth the like.

By his attorney, E. METCALF.

And said cause was continued from term to term to the present November Term, 1868, of said court, when it was called for trial on the 12th day of said term, being the 30th November, 1868, upon the pleadings and proofs offered therein, and was argued by counsel and committed to the following jury : Amasa M. Eaton, foreman; David Alexander, Wm. M. Baily, Jr., John Barnes, James Byrne, James B. Brown, Edwin C. Capwell, Wm. H. Carpenter, Franklin Cottrell, John D. Frost, Albert M. White, Henry G. Puetrer, who returned a verdict which was duly affirmed as follows :

18 The jury find that the defendants did not promise in manner and form as the plaintiff hath above thereof alleged against them in his declaration.

AMASA M. EATON,
Foreman.

Upon which verdict, and before judgment, the plaintiff in open court excepted thereto, and said exceptions were duly filed on said 30th day of November, 1868, and a writ of error ordered to issue returnable to the Supreme Court of the United States, at its December term, 1868.

Whereupon the following judgment was entered :

Judgment.

It is considered by the court here that the defendants have and recover of the plaintiff their costs of suit taxed at

19 And on the same day the following bond for costs were filed :

Bond for costs.

Know all men by these presents, that we, Edward C. Bates, as principal, and William H. Reynolds, of Providence, in the State and district of Rhode Island, are held and firmly bound unto the Equitable Fire and Marine Insurance Company, in the full and just sum of five hundred dollars, to be paid to the said insurance company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents. Sealed with our seals and dated the thirtieth day of November, A. D. 1868.

Whereas the above-named Edward C. Bates hath prosecuted
21 a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, by the Circuit Court within and for said district:

Now therefore, the condition of this obligation is such, that if the above-named Edward C. Bates shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his said writ, then this obligation shall be void, otherwise shall be and remain in full force and effect.

[L. S.] EDW'D BATES,
[L. S.] WM. H. REYNOLDS,

Signed, sealed and delivered in presence of

CHARLES BABBIDGE,
Witness to signature of E. C. Bates.
EDWIN METCALF,
To signature of Wm. H. Reynolds.

22 And on the said thirtieth day of November, A. D. 1868, and before judgment, the plaintiff filed the following:

U. S. Circuit Court. November term, 1868.

Bill of exceptions.

EDWARD C. BATES
vs.
EQUITABLE FIRE AND MARINE INS. CO.

R. I. DISTRICT, *ss*:

This was an action of assumpsit to recover for a loss by fire under a policy of insurance issued by the defendants. At the trial this day before Hon. Nathan Clifford and J. R. Bullock, justices, and a jury, and the following is a report of the evidence.

23 *Testimony for plaintiff.*

Charles F. Manson (sworn:)

Reside in New York. Resided in Boston in October, 1861, and was in plaintiff's employ; had charge of his books at that time, and for six or eight years previously, and subsequently, until after Feb ruary, 1862.

Witnessed signature of W. D. Philbrick to endorsement of policy November 23d, 1861, at plaintiff's counting room, No. 9 Merchant's Row, Boston. Policy then delivered to plaintiff.

Witnessed Philbrick's signature to order on Smith & Millett, November 23d, 1861. Smith & Millet's acceptance of this order is in Smith's handwriting. The sugar was then at the refinery, on Sargent's wharf, Boston. After this order was given, plaintiff took possession of the sugars at the refinery, and bought and sent there other sugars, and the manufactured sugars were delivered to him or upon his order up to the time of the fire. He sold sugars from time to time, and received the proceeds.

Amount of sugars on hand at refinery at time of fire, between sixty and seventy thousand dollars.

Proves signatures of Philbrick's orders of October 16, 1861, October 19 and 21, 1861, and Smith & Millett's acceptances of same.

Francis E. Smith (sworn:)

Was in business in 1860 and 1861 with Millett, copartners as Smith & Millett, sugar refiners, Sargent's wharf, Boston.

From the fall of 1860, W. D. Philbrick furnished us sugars to be refined, and in October, 1861, had these sugars to the amount of between $60,000 and $70,000.

His orders on us already proved in the case were acted on by us, and the sugars delivered to the plaintiff in conformity with them. After the last order, November 23d, 1861, plaintiffs sent us sugars

Upon which verdict, and before judgment, the plaintiff in open court excepted thereto, and said exceptions were duly filed on said 30th day of November, 1868, and a writ of error ordered to issue returnable to the Supreme Court of the United States, at its December term, 1868.

Whereupon the following judgment was entered :

Judgment.

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Whereas the above-named Edward C. Bates hath prosecuted
21 a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, by the Circuit Court within and for said district:

Now therefore, the condition of this obligation is such, that if the above-named Edward C. Bates shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his said writ, then this obligation shall be void, otherwise shall be and remain in full force and effect.

[L. S.] EDW'D BATES,
[L. S.] WM. H. REYNOLDS,

Signed, sealed and delivered in presence of

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Witness to signature of E. C. Bates.
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U. S. Circuit Court. November term, 1868.

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23 *Testimony for plaintiff.*

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Reside in New York. Resided in Boston in October, 1861, and was in plaintiff's employ; had charge of his books at that time, and for six or eight years previously, and subsequently, until after Feb ruary, 1862.

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Witnessed Philbrick's signature to order on Smith & Millett, November 23d, 1861. Smith & Millet's acceptance of this order is in Smith's handwriting. The sugar was then at the refinery, on Sargent's wharf, Boston. After this order was given, plaintiff took possession of the sugars at the refinery, and bought and sent there other sugars, and the manufactured sugars were delivered to him or upon his order up to the time of the fire. He sold sugars from time to time, and received the proceeds.

Amount of sugars on hand at refinery at time of fire, between sixty and seventy thousand dollars.

Proves signatures of Philbrick's orders of October 16, 1861, October 19 and 21, 1861, and Smith & Millett's acceptances of same.

Francis E. Smith (sworn:)

Was in business in 1860 and 1861 with Millett, copartners as Smith & Millett, sugar refiners, Sargent's wharf, Boston.

From the fall of 1860, W. D. Philbrick furnished us sugars to be refined, and in October, 1861, had these sugars to the amount of between $60,000 and $70,000.

His orders on us already proved in the case were acted on by us, and the sugars delivered to the plaintiff in conformity with them. After the last order, November 23d, 1861, plaintiffs sent us sugars

to be refined, which, as fast as refined, were delivered to him.
24 The fire occurred February 24th, 1862. Plaintiff then had at the refinery sugars to the amount of about seventy thousand dollars. The fire began a long distance from us; ours was the last place burnt. I was not at the fire.

Gustavus R. Jasper was our foreman and had charge of our works.

Cross-examination.

Smith & Millett were occupants of the refinery, and did the work of refining the sugars.

Direct examination resumed.

Proves agreement of October 12, 1861, between Smith and Millett and plaintiff.

We acted under this agreement after that date, and refined no sugars for other parties; received none except from plaintiff.

Plaintiff (sworn:)

Purchased sugars of William D. Philbrick in October, 1861. Have heard his orders read to the jury. They are correct. The sugars were delivered to me under them. The order of November 23d, 1861, completed the delivery, and this policy was then delivered to me in accordance with my contract with Philbrick. The premium for the unexpired portion of the term was taken into account in making the purchase.

I sent other sugars to the refinery down to the time of the fire.

The statement of loss read to the jury is correct; the sugars then at the refinery were worth about seventy thousand dollars. The amount named in the list sent to defendants and read to the jury was the total amount of insurance on the property.

Cross-examination.

I obtained insurance on this property in my own name at different offices. The Suffolk Insurance Company was one. As fast as
25 I paid Philbrick money or sent sugars to the refinery, I obtained policies of insurance in my own name. All the insurance was in my name except this policy and one at Providence, Washington Insurance Company.

I received pay on all policies except the two in Providence; I think about three years ago. It was left to referees.

Direct examination resumed.

Philbrick's policies expired, and I renewed them in my own name. I think all had expired except these. Suits were brought against Boston offices, four in all; all referred. I understood the other offices agreed to abide the decision; some did; all settled.

Gustavus A. Jasper's deposition read to jury:

Defendants move for non-suit on following grounds. Motion denied.

1. The policy declared on, among other things, provides "that if the property insured should be sold or conveyed in whole or in part, or if this policy shall be assigned without the consent of this company, the risk hereby assumed shall cease, and this policy shall become void;" and further, (citing the clause and endorsement contained in exhibits Nos. 1 and 2.)

The uncontradicted evidence shows that no notice of the sale and conveyance of the insured property from Philbrick to plaintiff was ever given, and that defendants had no knowledge of such sale and conveyance unless it was to be inferred from said endorsement on the policy.

They therefore claim that plaintiff is not entitled to recover in this suit, because no notice to them of a sale and conveyance, and therefore no consent of the insurers to a continuance of the risk for the benefit of the purchaser, evidenced by a certificate of the fact or by endorsement on the policy, had been shown, and because notice of such sale cannot be inferred from said endorsement.

26 2. The policy represents that the insured property was, at the time of the insurance, "in the frame building with composition roof occupied by the assured," &c.; and also provides, that "it is fully understood by and between the parties hereto that if said representation does not contain a full and true exposition of all the facts and circumstances in relation to the condition, situation, value and risk of the property hereby insured, so far as the same are material to the risk, then and in every such case, the risk hereby assumed shall cease, and this policy shall become void."

The plaintiff proves that said building, at the time the policy was obtained by Philbrick, was occupied by Smith & Millett, sugar refiners, and was so occupied by them till the time of loss, and that the insured property was by them delivered to plaintiff as soon as refined, and that Philbrick and plaintiff supplied them all the sugars there refined.

Upon these facts and provisions, defendants claim that plaintiff cannot recover, because Philbrick's representations that the property insured was then in a building occupied by him was not true, and because said representation was of a fact material to the risk assumed.

3. The policy is in the name of W. D. Philbrick; the suit is by Edward C. Bates.

Defendants claim that plaintiff is not entitled to recover, because it appears by his uncontradicted testimony that the insured property, at the time of loss, belonged to E. C. Bates & Company, a special limited copartnership under the laws of Massachusetts, of which plaintiff was the only general partner.

27 *Testimony for defendants.*

Thomas G. Turner (sworn:)

President of Equitable Insurance Company since its formation. Signed the correspondence read in this case.

The first knowledge I had of any change of ownership was from a man standing in the ruins of the fire the morning after it occurred. He told me Mr. Bates had bought out Mr. Philbrick some months before. I had, and the company had, no knowledge or notice previous to this of any change of ownership of the property insured.

Question. "What, by usage among men engaged in the insurance business, do the words 'payable in case of loss' to a party other than the assured, mean or indicate as to the respective titles of the assured and payee in the property insured?"

(Objected to, and ruled out.)

Cross-examination.

Do you know the name of the person who spoke to me at the place of the fire. Did not call on Philbrick or plaintiff; never saw either of them.

Frederick W. Arnold, (sworn:)

Secretary of defendants, November 23, 1861, and ever since. Signed the endorsement of the policy. Company had no knowledge of any sale by Philbrick to Bates until after the fire.

Cross-examination.

The policy, with the endorsement upon it, was sent to us in a letter from Reed & Hastings, insurance brokers in Boston, not acting for us then or since. This letter came with it. (Reads letter to the jury.) Will produce copy of my letter in return. Made no inquiry as to Bates' title, unless it may appear in my letter.

28 *Testimony for plaintiff in rebuttal.*

Plaintiff recalled:

Was in partnership; Thomas W. Pierce, special partner, myself general partner—formed under advice of A. H. Fiske, esq.; Pierce contributed $50,010; articles dated February 1, 1860; the certificate was recorded in registry of deeds; public notice was given of the partnership, and the statutes of Massachusetts complied with in all respects, under the advice of counsel.

Francis E. Smith, recalled:

W. D. Philbrick owned all the sugars at the refinery; we refined for no one else, and afterwards for plaintiff in the same way.

Cross-examination.

Smith & Millett occupied the works, refined the sugars made by Philbrick, and afterwards by plaintiff.

PAPERS READ TO THE JURY, (numbered 1 to 16.

No. 1.—*Policy of insurance.*

In ordinary form for $3,000, one year from October 11. 1861, to William D. Philbrick, "on stock of sugar, raw, wrought and in process, contained in the frame building, with composition roof, occupied by the assured for refining sugar, situate on Sargent's wharf, Boston, Mass.," and containing the following clause:

"And this company agree, that if the assured shall sell the aforesaid property, or any part thereof, before the expiration of this
29 policy, a proportion of the premium received shall be repaid upon receiving notice of such sale before a loss happens, reserving, however, three months' premium on the sum insured, over and above the amount which would be due at the time of receiving such notice; or the policy may continue for the benefit of such purchaser, if this company give their consent thereto, to be evidenced by a certificate of the fact, or by endorsement on this policy."

No. 2.—*Endorsement on policy.*

BOSTON, Nov. 23d, 1861.

Payable in case of loss to Edward C. Bates.

W. D. PHILBRICK.

Witness:
C. F. MANSON.

PROVIDENCE, *Nov. 29th*, 1861.

Consent is hereby given to the above endorsement.

EQUITABLE INSURANCE CO.,
FRED. W. ARNOLD, *Sec'y.*

No. 3.—*Plaintiff to defendant.*

BOSTON, *25th February*, 1862.

T. G. Turner, Esq., Pres't Equitable Fire Ins. Co., Providence:

SIR: I hereby notify you that I claim a total loss under policy No. 700, dated Providence, October 11, 1861, in amount $3,000, insured on sugars raw, wrought and in process, contained in sugar refinery situated on Sargent's wharf, Boston, the same having been totally destroyed by fire last night.

Respectfully,

(Signed) E. C. BATES.

30 No. 4.—*Defendant to plaintiff.*

EQUITABLE FIRE AND MARINE INSURANCE COMPANY,
PROVIDENCE, *February* 27, 1862.

Edward C. Bates, Esq.:

DEAR SIR: Yours of the 25th, notifying me that you claim a total loss under our policy No. 700, dated October 11, 1861, for $3,000,

"on sugar raw, wrought and in process, contained in sugar refinery situate on Sargent's wharf," was received yesterday.

In reply, I beg leave to refer you to said policy, issued by this company to William D. Philbrick, by the terms of which you will perceive that the liability of this company ceased on the day that Mr. Philbrick ceased to be the occupant of the refinery and the owner of the property insured.

Respectfully yours,

(Signed) THOMAS G. TURNER, *Pres't.*

No. 5.—*Plaintiff to defendant.*

BOSTON, *March 1st*, 1862.

Thomas G. Turner, Esq., President Equitable Fire Ins. Co., Providence :

Yours of 27th ult. received. The policy at your office on sugar refinery, in amount $3,000, was originally taken out by Mr. Philbrick, but transferred to me November 23d, 1861, and approved by your company, at Providence, November 29th, 1861.

I hand you herewith a statement of stock at sugar refinery at time of the fire, made up from the books of the refinery, and also a memorandum of the entire insurance on same.

Respectfully,

(Signed) EDW. C. BATES.

31 No. 6.

Statement of stock in sugar refinery February 24, 1862, amounting to $71,889 54

No. 7.

Statement of insurance in thirteen offices, amounting to..... $54,750

Both signed by E. C. Bates, February 28, 1862.

No. 8.—*Defendant to plaintiff.*

EQUITABLE FIRE AND MARINE INSURANCE COMPANY,
Providence, March 3d, 1862.

DEAR SIR: Yours of the 1st is received and contents noted. You state that our policy was transferred to you on the 23d of November. and approved by this company on the 29th. I do not so understand the transaction. No notice has ever been received by this company, nor was it known by us until after the destruction of the property by fire, that a change of ownership had taken place. We did consent that in case of loss to Mr. Philbrick's property, insured by our policy, that loss should be paid to you, but no transfer of the policy has ever been made with our consent.

Upon the proof of loss by Mr. Philbrick on the property insured

by our policy No. 700, the amount will be paid to you in accordance with the terms of the policy.

I am, sir, respectfully yours,

(Signed) THOMAS G. TURNER, *Pres't.*

32 No. 9.

BOSTON, 29 *Nov.*, 1861.

You will please deliver to order E. C. Bates all sugars and syrups in your refinery made from the sugars I have heretofore sent you, to extent of thirty-one thousand dollars.

W. D. PHILBRICK.

To Messrs. Smith & Millett, Sargent's Wharf, Boston.

Witness:
C. F. MANSON.

Endorsed: Smith & Millett.

No. 10.

BOSTON, 16 *Oct.*, 1861.

Messrs. Smith & Millett:

Please deliver to order E. C. Bates 512 bbls. of your refined sugar to the value of ninety-five hundred dollars ($9,500) at the present market price of said sugar—having received of said Bates the value thereof.

W. D. PHILBRICK.

To Messrs. Smith & Millett.

BOSTON, 18 *Oct.*, 1861.

Accepted.

SMITH & MILLETT.

33 No. 11.

BOSTON, 19 *Oct.* 1861.

To Messrs. Smith and Millett, refiners, Sargent's wharf:

Please deliver E. C. Bates or order 1,475 bbls. refined sugar, to the value of twenty-seven thousand dollars, ($27,000,) having received from said Bates the above amount in cash, and charge same to account of your obedient servant,

W. D. PHILBRICK.

BOSTON, 19 *Oct.*, 1861.

We accept the above order, and promise to deliver to order said Bates the above amount in refined sugars, as he may call for them, at the market price.

SMITH & MILLETT.

No. 12.

BOSTON, 21 *Oct.*, 1861.

Messrs. Smith & Millett:

Please deliver to order of E. C. Bates 311 bbls. of refined sugar to the amount in value, at present market prices, of twenty-three hundred eighteen and 29-100 dollars, having this day received of him said amount on your account—$2,318 29-100.

W. D. PHILBRICK.

BOSTON, 21 *Oct.*, 1861.

The above order is accepted.

SMITH & MILLETT.

34 No. 13.

An agreement made this 12th day of October, A. D. 1861, by and between said Francis E. Smith and Needham C. Millett, both of Salem, in the county of Essex, sugar refiners and copartners under the name and firm of Smith & Millett, of the first part, and Edward C. Bates, of Swampscott, in said county of Essex, merchant, of the second part, witnesseth:

That it is covenanted, declared and decreed by and between the said parties and their respective legal representatives and assigns, in manner following, that is to say:

1st. That the said Bates shall employ the said Smith & Millett to refine sugars for him for and during the term of one year next after the date hereof, and for that purpose will furnish them with such sugar as they may select as fit and suitable for that purpose, for which sugar the said Bates shall pay either in money or his notes or acceptances; provided always that the said Bates shall not be required to be under advance, either in money or notes, beyond the amount of ten thousand dollars at any one time over and above the receipts which he shall have on hand from the sales of the products of said sugars, as herein provided to be made by him.

2d. That the parties of the first part shall refine all such sugars at their sugar refinery upon Sargent's wharf, in the city of Boston, with their own machinery and utensils provided for that purpose, at their own cost, charges and expenses, and shall, at their own expense, furnish all the material and labor needful or requisite for that purpose. And therein shall use and exercise their best skill and judgment, and shall produce an article of the first quality; and all the refined sugar, and all other products from the refining of the sugar aforesaid, they shall from time to time, as fast as the same is in readiness, and with all possible despatch, return and deliver to the said Bates, at his store in Boston.

3d. That all such refined sugar, and all other products, the said Bates shall sell and dispose of, either for cash or on credit,
35 according to his discretion, and therein shall use his best skill and discretion, and shall make up and render to the said par-

ties of the first part, once in every three months, together with an account current with said refinery; and if, after deducting from the proceeds of the said refined sugar and other products a commission of three per cent. on the gross sales (which includes a guaranty commission) to said Bates on all time sales, the cost of all said sugars furnished to the said party of the first part, the expense of advertising, storage, cartage, truckage, insurance and delivery, and interest on all moneys advanced beyond the amount of all moneys received, according to an interest account to be kept, shall pay the residue to the said parties of the first part, which shall be a full compensation for the refining of the said sugars and all expenses in any way incident thereto, and they shall have no further claim whatsoever on him in any respect thereto.

4th. That the said parties of the first part shall not be entitled to be paid their said compensation except at the expiration of each and every quarter year, and except such sums as shall be absolutely necessary to enable them to carry on their business. But in no case shall said Bates be required to advance them any money over and beyond the amount of their compensation which shall be in his hands at the time, unless he shall please so to do.

5th. That the said raw sugar, in its raw state and in all the states and conditions and processes of being refined, and the sugar when refined, and all the products thereof, shall be the sole and absolute property of the said Bates, and the parties of the first part shall have no right, title or interest therein or thereto, or any lien thereon, or any right to any account therefor, except as herein provided.

6th. That there shall be no partnership or community of profits between the said parties in any way, manner or form; nor shall the said Bates, in any way or manner, be liable for any loss which shall result from the said business.

7th. That during the existence of this agreement, the parties of the first part shall not, without the consent of the said Bates, refine any sugar for any other person whatever.

36 In testimony whereof, the said parties have hereto set their hands and seals the day and year first above written.

[L. S.] FRANCIS E. SMITH,
[L. S.] NEEDHAM C. MILLETT.
[L. S.] EDWD. C. BATES.

Witnessed by
FRANK MILLETT.

No. 14.

BOSTON, *Nov.* 28, 1861.

Thos. G. Turner, Esq.,

DEAR SIR: Will you please approve of the endorsement on the enclosed policy, and oblige

Yours, truly,

REED & HASTINGS.

Please send policy for Phillips, Ragan & Sheldon. All our companies have the same.

No. 15.

Nov. 29, 1861.

Messrs. Reed & Hastings :

GENTS : Yours of 28th inst. is received. Herewith please find policy 700 endorsement—notice also policy 809, Phillips, Rogers & Sheldon. Policy 806. $2,333, at 1¾ per ct., $40.

Yours, respectfully,

FRED. W. ARNOLD, *Sec'y.*

37 No. 16.—*Limited partnership.*

This certifies that the undersigned Edward C. Bates and Thomas W. Pierce, have formed and entered into a limited partnership for the purpose of transacting a general commission business in the city of Boston, under the name and firm of Edward C. Bates. And therein the said Bates, whose place of residence is Swampscott, in the county of Essex and commonwealth of Massachusetts, is the general partner, and the said Pierce, whose residence is the city of Boston, in the county of Suffolk, in said commonwealth, is the special partner, and as such special partner has contributed to the common stock as capital, in actual cash payment. the sum of fifty thousand dollars.

Said partnership is to commence on the first day of February, in the year of our Lord, one thousand eight hundred and sixty, and is to terminate on the 31st day of January, A. D. 1862.

EDW. C. BATES,
THOMAS W. PEIRCE.

FEBRUARY 1*st*, 1860.

SUFFOLK, *ss* :

Then personally appeared Edward C. Bates and Thomas W. Peirce, and severally acknowledged the above instrument to be their free act.

Before me.

EDWARD FISKE,
Justice of the Peace.

38 The defendants requested the court to instruct the jury that in view of the whole evidence the plaintiff is not entitled to recover, and that in judgment of law their verdict should be for the defendants, and after the parties were fully heard, the court gave that instruction, to which the plaintiff then and there excepted before the jury left the bar.

And thereupon the jury returned a verdict which was duly affirmed in the words following, to wit : "The jury find that the defendants did not promise in manner and form as the plaintiff hath thereof alleged against them in his declaration.

(Signed) "AMASA M. EATON,
"*Foreman.*'

39 And inasmuch as the matters referred to and the several instructions, rulings and declinations to rule of the honorable court, so objected to, do not appear by the record of the verdict aforesaid, the counsel for the plaintiff prayed the honorable court to set their seals to this bill of exceptions containing the rulings and directions of the court thereupon and the exceptions thereto; all of which, being found to be true, are allowed.

In witness whereof we have hereunto set our hands and seals this 30th day of November, A. D. 1868.

[L. S.]

NATHAN CLIFFORD,
Associate Justice U. S. Supreme Court.
J. R. BULLOCK,
U. S. District Court.

40 The President of the United States to the judges of the Circuit Court of the United States for the first circuit within and for the Rhode Island district, greeting :

Because that in the record and process and also in the recording of a judgment in a suit before you, between Edward C. Bates, of the city of Boston, in the State of Massachusetts, plaintiff, and the Equitable Fire and Marine Insurance Co., a corporation created by the general assembly of Rhode Island, and doing business in the city of Providence, in said Rhode Island district, defendants, in an action of the case, a manifest error has intervened to the great damage of the said plaintiff;

And it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf;

41 You are hereby commanded that if judgment thereof be given, then under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all the things concerning them, and this writ, so that you have the same before the Supreme Court of the United States to be holden at Washington, on the third Monday of December, 1868; that the record and process aforesaid being inspected, said court may cause to be done thereupon what of right ought to be done.

Witness the Hon. Salmon P. Chase, our chief justice, at Providence, this 30th day of November, 1868.

HENRY PITMAN, *Clerk.*

Allowed.

NATHAN CLIFFORD,
Asso. Just. Sup. Court U. S.

42 RHODE ISLAND DISTRICT, *ss:*

The President of the United States of America to the marshal of said district or to his deputy, greeting:

You are hereby required to make known unto the Equitable Fire and Marine Insurance Company, a corporation created by the general assembly of the State of Rhode Island, doing business at Providence in said State, a citizen of said State, that in a certain action of the case wherein the said Equitable Fire and Marine Insurance Company are defendants and Edward C. Bates, of the city of Boston, in the State of Massachusetts, a citizen of said State of Massachusetts, is plaintiff, wherein judgment was rendered against the said plaintiff in the Circuit Court of the United States, for the first circuit and district of Rhode Island, at its November term, 1868, to wit,

43 on the 30th day of November, 1868, the said plaintiff hath this day sued out a writ of error unto the Supreme Court of the United States to be holden at Washington, on the third Monday of December, 1868.

And that the said Equitable Fire and Marine Insurance Company are therefore cited and admonished to appear at said Supreme Court to show cause, if any there be, why the judgment rendered against the said Edward C. Bates, in the same writ of error mentioned, should be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the seal of said court and my hand this 30th day of November, A. D. 1868.

[SEAL.] NATHAN CLIFFORD,
Associate Justice Supreme Court United States.

44 RHODE ISLAND DISTRICT:

PROVIDENCE, *Dec. 11th*, 1868.

I have this day served the written order on the Equitable Fire and Marine Insurance Company, by giving to Thomas G. Turner, the president of said company, a true and attested copy hereof in hand.

R. SHERMAN,
U. S. Marshal.

Service	$ 2 00
Copy	50
Travel	26 40
	$28 90

45 UNITED STATES OF AMERICA,
District of Rhode Island, ss:

CLERK'S OFFICE CIRCUIT COURT,
At Providence, Dec. 18th, 1868.

I, Henry Pitman, clerk of the Circuit Court of the United States for the first circuit and district of Rhode Island, in pursuance of the command contained in the within writ of error, do make return

thereof and annex hereto and transmit herewith a true copy of the entire record and proceedings in the cause Edw'd C. Bates vs. Equitable Fire and Marine Insurance Company, wherein judgment was rendered in said Circuit Court of the United States.

I also annex the citation served upon the defendant, upon the issuing of said writ of error.

46 In testimony whereof I have hereunto set the seal of said court and my hand this 18th day of December, 1868.

[SEAL.] HENRY PITMAN, *Clerk.*

UNITED STATES CIRCUIT COURT,

DISTRICT OF RHODE ISLAND, NOVEMBER TERM, 1868.

EDWARD C. BATES,

vs.

THE EQUITABLE FIRE AND MARINE INSURANCE COMPANY.

OPINION OF THE COURT.

Mr. Justice CLIFFORD delivered the opinion of the court in the following case, heard in a previous term: Edward C. Bates *vs.* The Equitable Fire Insurance Company. Assumpsit upon a policy of insurance. Plea, the general issue, and verdict for the plaintiff, subject to the opinion of the court upon questions of law reserved at the trial.

The policy is dated October 11, 1861, and it was issued to William D. Philbrick, in the sum of $3,000, for one year from date, on stock of sugar, raw, wrought, and in process, contained in the frame building with composition roof, occupied by the assured for refining sugar, situate on Sargent's wharf, Boston, Massachusetts.

Terms of the policy, material to be noticed, are, that if the situation of the property or the circumstances affecting the risk shall be, during the existence of the policy, altered or changed by or through the advice, consent, or agency of the assured, or if the said property should be sold or conveyed, in whole or in part, or if this policy shall be assigned without the consent of this company, * * * * then, and in every such case, the risk hereby assumed shall cease and this policy shall become void. But the company agree, that if the assured shall sell the property, or any part thereof,

before the expiration of this policy, a proportion of the premium received shall be repaid, upon receiving notice of such sale before a loss happens, reserving, however, three months' premium on the sum insured over and above the amount which would be due at the time of receiving such notice, or the policy may continue for the benefit of the purchasher, "if the company give their consent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy."

Execution of the policy is admitted, and the evidence showed that the assured at that date was the owner of $60,000 or $70,000 worth of sugars on that wharf of the description specified in the policy.

Plaintiff, shortly after the date of the policy, purchased the sugars of the assured, and the same were delivered to him pursuant to orders of the seller on or before the 23d day of the following November.

Delivery of the sugars to the plaintiff was completed on that day, and on the same day the assured indorsed the policy to the plaintiff in the terms following, to wit: Payable in case of loss to Edward C. Bates, and signed the same and delivered the policy to the plaintiff. Proofs also showed that he made the indorsement in purchasing the contract of sale, and that the premium for the unexpired portion of the term of the policy was taken into the account between the parties in making the contract. Certain insurance brokers, on the 28th of the same month, enclosed the policy with the indorsement thereon, signed by the assured, to the president of the company, requesting him to approve of the indorsement; and on the following day the policy was returned to the brokers indorsed, "Consent is hereby given to the above indorsement," and the same was signed "Equitable Insurance Company, Fred. W. Arnold, Secretary."

Subsequent to the purchase and delivery of the sugars the plaintiff carried on the business of refining sugars at that refinery, substantially in the same way that the business prior to that time had been conducted by his vendor, and at the time of the loss he had on hand a quantity of sugars

equal to that which was owned by the assured at the date of the policy, and of the same descriptions.

During the night of the 24th of February, 1862, the entire stock of sugars in that refinery was destroyed by fire. Due notice of the loss was given by the plaintiff on the following day, and two days later the defendants admitted the receipt of the notice, but declined to pay the amount upon the ground that the assured ceased to be the owner of the property before the loss, and that they had never consented to any change of ownership in the property insured. They set up the same defence at the trial, but the court overruled it, and directed a verdict for the plaintiff, reserving the question for further consideration. Since that time the parties have been fully heard, and I will now proceed to state my conclusions and the reasons upon which they are founded.

Time policies upon a stock in trade, especially where they cover a considerable period of time, and where from the nature of the business it appears that the parties must have understood that the stock would be continually changing, applies to the goods in the place of business from time to time as purchases are made to supply the place of the goods sold in the usual and regular course of business, within the lifetime of the policy. (1 Phil. on Ins., secs. 489, 491; Angell on Ins., sec. ——; Lane *vs.* Maine Marine and Fire Insurance Company, 12 Me., 44; Hopper *vs.* Hudson River Fire Insurance Company, 17 N. Y., 426.)

Partial sales of the stock therefore under such a policy, if the vacuum is regularly supplied by new purchases of equal value and of the same description of goods, will not render the policy void, even though the entire stock may change before the loss occurs. Unless the rule were so, a policy of insurance upon a stock in trade for any considerable period of time would cease to be an indemnity against loss.

Such partial sales in the usual course of business are not prohibited by the terms of the policy in this case. Both parties knew that the sugars on hand were to be manufactured, and that the product was to be sold, and that the unmanufactured sugars were to be supplied by new purchases to keep

the stock good, and it is not pretended by the defendants that any such sales and purchases had the effect to impair the right of the assured to recover on the policy. On the other hand, the plaintiff concedes that in case of the sale of the property, such as was made by the assured to the plaintiff, the risk would cease and the policy become void, unless the company gave their consent thereto within the true intent and meaning of that condition in the policy. Whether conceded or not, it is clear that without such consent the policy would not continue for the benefit of the purchaser, and it is equally clear that the consent, to be valid, must be evidenced substantially as required in that clause of the policy.

Parties make their own contracts, and courts are bound by their terms and conditions. Express words of the condition are that the policy, in case of a sale, may continue for the benefit of the purchaser, "if this company give their consent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy."

None of these views are directly controverted by the plaintiff, but he insists that the indorsement appearing on the back of the policy is a substantial compliance with the condition in that behalf, as before recited, which is the principal question between the parties.

Reference is made by the plaintiff to the case of Hooper *vs.* Hudson River Railroad, (17 N. Y., 426,) as supporting his views that the indorsement on the policy in this case affords sufficient evidence that the defendant had notice that he had purchased the property of the assured. Careful examination of that case, however, will show that it is not analogous, and that it does not support the proposition as applied to the case before the court. Statement of the case shows that the entire stock in trade of the assured was sold at auction, and that the plaintiff in the suit on the policy became the purchaser, and on the same day he applied to the insurance company and obtained their consent in writing, indorsed on the policy, that the interest of the assured in the policy might be assigned to him, and he subsequently took such an assignment in writing before the loss.

Right to the benefit of the policy was denied because the purchaser did not disclose his interest when he appealed to the company for their consent that the policy might be transferred, but the court held that the act of applying for consent that the policy might be assigned was notice to the company that the applicant had acquired or was about to acquire some interest in the property insured. Destitute as this case is of every feature of that case, it hardly seems necessary to point out the differences. Suffice it to say, that in this case there was no application for consent that the policy might be assigned; no consent to that effect was ever given, nor did the assured ever execute any assignment of the policy.

Sale of the property by the assured without any antecedent consent of the company is proved and admitted, and of course the risk ceased and the policy became void at that time, unless the purchaser subsequently secured the consent of the company thereto, as required by the terms of the policy. (Carpenter *vs.* Providence and Washington Insurance Company, 16 Peters, 502; Foster *vs.* Equitable Insurance Company, 2 Gray, 216; Grosvenor *vs.* Atlantic Fire Insurance Company, 17 N. Y., 391; Loring *vs.* Manufacturers' Insurance Company, 8 Gray, 29.)

The next inquiry is, what is the true meaning and legal effect of the indorsement in this case to which the defendants consented through their secretary.

Direct adjudication in the case of Grosvenor *vs.* Atlantic Fire Insurance Company, 17 New York, 391, was where a fire policy names the owner as the person insured, and declares that the damages, in case of loss, shall be payable to another person therein named as mortgagee, that the latter cannot recover in case of a breach of the conditions of the policy by the mortgagor. In such case the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only where the mortgagor could have done so had the money been payable to himself, instead of being payable for his benefit to the mortgagee. (Insurance Company *vs.* Chase, 5 Wall., 516.)

Present case is no stronger than those cases where the

appointee to receive the money in case the property of the assured is lost is named in the policy itself, instead of being appointed by an indorsement on the back. Neither such a stipulation in the policy nor such an endorsement on the back of the policy amounts to an assignment of the policy, or operates as a transfer of the property insured. Decided cases to this point are quite numerous, and they are all one way. (Hale *vs.* M. M. Fire Insurance Company, 6 Gray, 169; Young *et al. vs.* Eagle Fire Insurance Company, 14 Gray, 153; Fogg *vs.* Middlesex Fire Insurance Company, 10 Cush., 387; Ketcham *vs.* Protective Insurance Company, 1 Allen N. B., 136; Loring *vs.* Marine Insurance Company, 8 Gray, 29.)

Argument of the plaintiff is, that the application to the defendants for consent that the sum insured in case of loss should be payable to him, was notice of the sale of the property and of the assignment of the policy, but it is clear that neither branch of the proposition can be sustained. (Fogg *vs.* Middlesex Insurance Company, 10 Cush., 348; State M. Fire Insurance Company *vs.* Robert, 10 Penn. St, 138; Insurance Company *vs.* Chase, 5 Wall., 516.)

Viewed in any light the plaintiff cannot recover. Purchase of the property insured was made by the plaintiff, but he did not secure the consent of the company to the sale, and they had no notice of the transfer prior to the loss. They consented in case the property of the assured should be destroyed that they would pay the amount to the plaintiff, but they never consented that the policy should continue for the benefit of any one except to the assured.

Verdict set aside.

SUPREME COURT OF THE UNITED STATES.

No. DECEMBER TERM, 1869.

EDWARD C. BATES, Plaintiff in Error,

v.

EQUITABLE FIRE AND MARINE INS. CO.

BRIEF OF THE PLAINTIFF.

SHORT STATEMENT OF THE FACTS.

The defendants, on the 11th October, 1861, issued their policy to William D. Philbrick, in and by which, for the term of one year, they insured him the sum of $3,000 — "on sugar, raw, wrought and in process, contained in the frame building, with composition roof, occupied by the assured for refining sugar, situate on Sargent's Wharf, Boston, Mass." See policy, *Record p.* 11.

At the date of the policy, Philbrick was the owner of sugars to the amount of $60,000 or $70,000, which were at Sargent's Wharf, raw, wrought, and in the process of refining. In October, 1861, soon after the execution and delivery of the policy upon which the premium had been paid, Edward C. Bates, the plaintiff, entered into a contract with Philbrick, for the purchase of all the sugars at Sargent's Wharf, and of the policies thereon, taking into account, and paying the premiums for the unexpired time covered by the policies. The sugars and the policies were to be delivered to Bates, from time to time, as he made payment, and equal in amount to such payments. On the 23d November, 1861, the plaintiff paid $31,000, the balance of the purchase-money, received the sugars, not previously delivered, and the policy in suit was indorsed and delivered to him by Philbrick. On the 28th November, the plaintiff

(through Reed and Hastings, Insurance Brokers,) sent the policy to the defendants, requesting them to approve of the indorsement thereon. The indorsement is in these words: —

"Boston, Nov. 23d, 1861.

"Payable, in case of loss, to Edward C. Bates.

(Signed,) "W. D. PHILBRICK."

Upon receipt of the policy, the defendants, acting by and under the signature of their Secretary, and underneath the indorsement by Philbrick, made an indorsement in these words: —

"Providence, Nov. 29th, 1861.

"Consent is hereby given to the above indorsement.

(Signed,) "EQUITABLE INSURANCE CO.,

"FRED. W. ARNOLD, Sec'y."

On the same day the defendants by their Secretary, and by letter to Reed and Hastings, return and redeliver the policy to the plaintiff, without inquiry, comment or qualification, merely saying, "Herewith please find policy 700, indorsement."

The plaintiff accepted the adoption and consent, given by the defendants, to the indorsement of Philbrick, retained the policy, and relied thereupon as an insurance upon the property described therein.

During the night of 24th February, 1862, the entire stock of sugar was destroyed by fire, at Sargent's Wharf.

On the 25th, the plaintiff gave notice to the defendants of the fire, and of his claim for a total loss.

On the 27th, the defendants admitted notice, but declined to pay, placing their refusal upon the ground that Philbrick had ceased to be owner of the property.

On the 1st of March, the plaintiff repeats his claim and demand, and furnished the defendants with a statement, from the books of the Refinery, of the stock, $71,889.54, destroyed, and with a memorandum of the entire insurance, $54,750, in thirteen offices.

On the 3d of March, the defendants reply, placing their refusal to pay upon the ground previously stated, — saying they did not understand the contract which they had made with the plaintiff, as he understood it.

Record pp. 11 *to* 14; *Exhibits* 1 *to* 12, *inclusive.*

The plaintiff, on the 24th of February, 1862, was the owner of the policy declared upon, and of all the sugars therein described, by purchase from Philbrick; the policy and the subject matter of the insurance having been acquired at the same time, upon the same consideration, and prior to the indorsement made by the defendants.

The sugars were destroyed by fire, subsequent to the indorsement and redelivery of the policy by the defendants, within the year, and at the place covered by the policy.

At the close of the evidence introduced by the plaintiff, the defendants requested the court to direct a nonsuit, assigning in support thereof three grounds, which direction the court refused to give. *Record p.* 9. At the close of the evidence on both sides, the defendants requested the court to direct the jury to find a verdict for the defendants, with which request the court complied. *Record p.* 16, *close of the page.*

POSITIONS.

I. The indorsement upon the policy, "Boston, Nov. 23d, 1861. Payable, in case of loss, to Edward C. Bates," made and signed by W. D. Philbrick, is an assignment of his entire interest in the policy, and in the property thereby insured. The indorsement is absolute and unconditional, without limitation, or the reservation of any right or interest in Philbrick, accompanied by a delivery of the policy to the plaintiff, by whom it was produced in court. The defendants, upon the application of the plaintiff, made through Reed and Hastings, (*Record p.* 14, *at the close,*) by an indorsement made upon the policy, consented to the indorsement made by Philbrick, and thereby became bound, absolutely, to pay the sum insured to Bates, in the case of a destruction (loss) of the property insured, by fire, at the place and within the year covered by the policy.

A. The words are capable of this construction. There is no proof tending to show that Philbrick did not sell, or intend to sell, the policy and the property therein described. There is no ground, legal or equitable, upon which the defendants can rely, to limit or restrain the indorsement of Philbrick within narrower limits, and thereby render it

unavailable, and as an exoneration of the defendants from liability, for which they have received and retain the premium.

B. The defendants, in the policy, stipulate, in express terms, that it may continue, notwithstanding a sale of the property insured, for the benefit of a purchaser, if the company give their *consent* thereto, to be evidenced by a certificate of the fact, *or by indorsement upon the policy.* (*Record p.* 11.) There is nothing, therefore, in the policy, to control or limit the construction or effect of the indorsement of Philbrick, which they have adopted and made their own.

C. It is in proof, not controverted or denied, that Bates purchased and paid for the policy, and the property therein described; took possession of the policy, of the property, and sent the policy to the defendants for their approval of the indorsement of Philbrick, which approval was given without qualification or inquiry, and the policy returned to the plaintiff as a subsisting and continuing obligation for his benefit, upon which he reposed and confided. The defendants are not at liberty to say that the indorsement by Philbrick did not transfer to Bates any interest in the property insured, or in the policy by which it was protected from loss by fire. See testimony of Manson, of Smith, and of the plaintiff, *Record pp.* 7 *and* 8; letters of Reed and Hastings, and the *reply of the defendants*, *Record pp.* 15 *and* 16.

Hooper v. *Hudson River Railroad*, 17 *N. Y. Court of App.* 426–428. In this case the court say: "It is insisted that the company had no notice of the sale to Hooper. The fact that he requested an assignment of the policy was sufficient notice that he had acquired, or was about to acquire, some interest in the goods. The assignment of the policy, to be of any benefit to the assignee, must be accompanied with a transfer of some kind of interest, in the subject of insurance, to the assignee."

428. "An assignment being of no avail without an interest in the subject of insurance, the request made to the defendants to consent to an assignment to plaintiff was of itself notice to them that he had acquired, or was about to acquire, an interest in the property. If important to defendants to know the nature of the interest which plaintiff had acquired, they should have asked for information. If content to consent without inquiry, it was their own fault."

The plaintiff purchased the sugars which were the subject matter of insurance, and also the policy, before any loss; and was owner at the time the sugars were destroyed; and as the fire was at Sargent's Wharf during the year covered by the policy, the plaintiff is entitled to recover.

Philbrick, by delivery of the policy with his indorsement thereon, to the plaintiff, in the execution of a contract of sale, conferred upon the plaintiff an absolute right to receive to his own use the sum insured, in the event of a destruction by fire of the subject matter of insurance.

The defendants, by consenting to the indorsement, and a redelivery of the policy, recognized the rights of Bates, as they existed under his contract with Philbrick, so far as they are not inconsistent with the indorsement.

Sheppard's Touchstone, Ch. 5, *p.* 82. "If divers join in a grant of a thing by deed, and one alone hath all the estate, and the rest have nothing in the thing granted, it shall be said to be his grant alone that hath the estate—and so, *e converso*. If a deed be made to one that is incapable, and to others that are capable, in this case it shall enure only to him that is capable."

The defendants, in their policy, agree in express terms, that it shall be continued in the event of a sale, for the benefit of the purchaser if the company give their consent to be evidenced by an indorsement on the policy. The only consent which the parties contemplated as shown by the policy, is, that in the event of a sale, it may be continued in favor of the purchaser. The policy was presented to the defendants, with an indorsement thereon absolute in terms, in favor of Bates, with a request for an approval, which was given without qualification, and the policy redelivered to Bates as a subsisting instrument upon which he has acted and reposed as a security and means of protection. This approval and redelivery enured to the use of Bates, in any capacity, he possessed, which was capable of protection under the policy. He was purchaser of the policy and of the goods therein described. A consent of the office has been given and indorsed upon the policy. The indorsements and the provision in the policy for the benefit of a purchaser are to be construed together. The words of the indorsements, and of the agreement to continue, upon well settled principles of construction, are to be taken most strongly against the persons whose words they are, and most in advantage of the other party. The construction for which the defend-

ants contend, excludes, altogether, from consideration, their agreement that the policy, in case of sale, should continue for the benefit of the purchaser.

Niblo v. *N. A. Fire Ins. Co.* 1 *Sand. S. C.* 551–54. Where the applicant for fire insurance states the nature or extent of his interest, he must state it truly. Where no inquiry is made or statement given, on the happening of a loss, he will recover according to his real interest whether it be absolute or qualified.

Fletcher v. *Com. Ins. Co.* 18 *Pick.* 421. Same principle.

It is submitted, the consent indorsed upon the policy by the defendants, created an express undertaking and promise to pay Bates the entire sum insured; It conferred upon him, a right of action, in his own name, to his use.

II. The indorsement upon the policy made by Philbrick is an incomplete instrument. It does not show the consideration paid by Bates, or the interest or title conferred upon him. The entire contract between Bates and Philbrick, under and in the execution of which the indorsement was made, may be shown in proof, so far as the same is not inconsistent with the indorsement. If the title of Bates, as shown in the proof, is capable of protection under the policy, he is entitled to recover.

A. The policy provides, (*Record p.* 11,) "and this company agree, that if the assured shall sell the aforesaid property or any part thereof, before the expiration of this policy, a proportion of the premium received shall be repaid upon receiving notice of such sale before a loss happens, reserving, however, three months' premium on the sum insured, over and above the amount which would be due at the time of receiving such notice; *or the policy may continue for the benefit of such purchaser, if this company give their consent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy.*"

B. The provision of the policy above recited, contemplates two and only two instances in which the defendants might be called upon before a loss should occur. One instance named is a return of a part of the premium: the other is a continuance of the policy for the benefit of a purchaser. Neither Philbrick or Bates asked for a return of premium. Bates, by presenting the policy, must have acted upon that part of the instrument which contemplates and provides for a continuance of the policy in favor of a purchaser.

Sweet v. *Lee*, 3 *Manning and Granger*, 425. An agreement in short and incomplete terms, parol evidence is admissible to explain what is unintelligible, not being inconsistent with the written terms.

Noonan v. *Lee*, 2 *Black.* 504. Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject.

2 *Phillips and Amos on Evidence*, 772. Where a writing evidently appears to express only some parts of an agreement entered into between the parties, parol evidence, it seems, would be admissible to prove the other parts of the agreement on which it is silent.

Lee v. *Dick*, 10 *Peters*, 482. A guarantee and letter on the same paper may be referred to, to explain each other.

In the case at bar, the indorsement upon the back of the policy and the provision in the policy in favor of a purchaser of the sugar insured, must be considered together, and so construed that each shall have effect.

Bradley v. *Washington Steam Packet*, 13 *Peters*, 94. Parol evidence admissible to give effect to written instruments by applying it to its subject matter, by proving circumstances under which it was made, whenever, without such evidence, application could not be made.

99. The cases we have collected will show the respects in which extrinsic evidence, in relation to written contracts, has been presented sometimes to deeds, to wills, to mercantile and other contracts. In some cases to ascertain which of several persons were intended. In others, which of several estates. In some to ascertain the identity of the subject, in others its extent.

Rey v. *Simpson*, 22 *How.* 341, 349. Proof of the attending circumstances under which the defendants, Marshall & Co., had placed their firm name upon the back of the note, would clearly have been admissible under the general issue. They put their name on, &c., knowing it had not been indorsed by payee, and with a view to give credit to it. Interpretation of contract must be such as to carry out the intention of parties. This may be made out in most cases by proof of facts and circumstances which took place at the time.

Maryland Ins. Co. v. *Leroy*, 7 *Cranch.* 26. General want of precision in the language of maritime contracts is an endless source of litigation among mercantile men. Courts of justice are, therefore, obliged to resort to such reasons as the nature, object and terms of the contract present, to determine the precise extent of the obligation of the parties.

Lawrence v. *McCalmont*, 2 *How.* 426. Guarantee to receive fair and reasonable interpretation, so as to obtain its object, and not a nice or technical construction.

Bell v. *Bruen*, 1 *How.* 169. Guarantee usually written without technical accuracy, and with reference to extraneous facts; construction adopted consistent with the fair import of the terms, and ascribes the most reasonable, natural and probable conduct.

Raymond v. *Tyson*, 17 *How.* 53. A charter party is an informal instrument, often having inaccurate clauses, which ought to have a liberal construction, in furtherance of the real intentions of the parties and usage of trade.

Chitty on Contracts, 10*th Amer. Edi.* 82. Construction liberal, shall prevail according to their most comprehensive, popular sense, unless something to restrain. 83. The construction shall be favorable, so that the agreement may, if practicable, be supported. 88. Every contract is to be construed with reference to its object, and the whole context must be considered. 99. Deed or other instrument shall be taken most strongly against the grantor or contractor.

Mauran v. *Bullus*, 16 *Pete.* 528.
Douglass v. *Reynolds*, 7 *Pete.* 113.
Construction against guarantor as strong as the sense will admit.

III. The defendants, by their indorsement upon the policy, became party contractors with Bates. This cannot be denied. This contract enures by intendment of law to his benefit, in any capacity, in which it was competent for him, under the terms of the policy, and the indorsement of Philbrick, to become a party contractor.

A. The consent of the defendants must be so construed, that the contract may take effect, and avail the plaintiff, if such construction can be adopted consistently with the terms of the policy, and the indorsement by Philbrick.

IV. The cases cited at the trial, by the learned counsel of the defendants, are not applicable to the case at bar. The principles and positions upon which the plaintiff relies, and which are fully sustained by the authorities, were not discussed or considered, in either of the cases cited in behalf of the defendants. The cases, in several material particulars, are different. They are not authorities binding upon the judgment of this court.

In the case cited from the 10*th Cushing*, 337 *Fogy, &c.*, — It does not appear that the plaintiff contracted for the purchase of the policy, and the indorsement upon it was not, in fact, made until more than a year after the purchase of the goods. It also appears, that no new deposit note was given by the plaintiff as required; that he was notified by the office, before the fire, that the policy was void because a deposit note had not been given — the decision was based upon the neglect to give such note.

Shaw, C. Jus., page 348, says — "It (the indorsement,) is in few and brief terms, and *prima facie*, we should be inclined to think that it was not an assignment of the contract, but only of a right to the money in case of loss.

In the case, from 6 *Gray*, 169, the court recognize the case above, and proceed to say that under the terms of the policy it was extinguished by a subsequent insurance obtained without the written consent of the office.

In the case cited from 8 *Gray*, 28, the indorsement of the policy, and the assent thereto, was prior to any sale of the property insured.

In the case cited from 14 *Gray*, 150, it appears a policy was issued to *A*, in the sum of $2,000 — of which $1,500 was payable to *B*, — subject to conditions and limitations, one of which was, the policy should be void in case of alienation of the estate — *A* took the benefit of the insolvent laws, which the court held was an alienation which destroyed the policy.

V. The second ground of defence, stated as ground of nonsuit, (*Record p.* 9,) is immaterial; is based upon an erroneous construction, and an incomplete recital of the clause relied upon. The policy does not import that Philbrick was owner or lessee of the frame building, upon Sargent's Wharf, in which the sugars were, or that it was to be personally or exclusively occupied by him. The building was used by Philbrick for refining sugar, which was the only occupation or use which the parties contemplated, as is shown by the language of the policy. No sugar was refined at these works, except such as was owned by Philbrick, until he sold to Bates, after which the plaintiff was the exclusive owner.

The language of the policy, (Record, 11,) is "on stock of sugar, raw, wrought, *and in process*, contained in the frame building with composition roof, *occupied* by the assured *for refining sugar*, situate on Sargent's Wharf, Boston, Mass."

Philbrick did occupy it, and Bates after him, in the same manner for refining sugar.

See Record, p. 14, contract Bates with Smith & Millet.

See Record, pp. 7, 8. The testimony of Smith.

VI. The third objection, (Record, p. 9,) that the suit cannot be maintained because the sugar belonged to a limited partnership under

the laws of Massachusetts, of which the plaintiff was the sole general partner and T. W. Peirce the special partner, if taken in season, cannot be sustained.

General Statutes of Mass. 296, *Ch.* 55, *Limited Partnerships.* Sections 1 to 8, inclusive, regulate the formation and manner of conducting the business.

Section 9. All suits respecting the business of such partnership shall be prosecuted by and against the general partners only, except, &c.

A. The plaintiff Bates, as the general partner in a limited partnership under the laws of Massachusetts, may maintain a suit in his own name in relation to the business or rights of the partnership, without joining the special partner as plaintiff. Under the statute he must so bring it.

Lord v. *Baldwin*, 6 *Pick.* 352.
Wood v. *O. Kelly*, 8 *Cush.* 409.
Story on Partnership, *Sec.* 241.

An ostensible partner may bring suit without joining a dormant partner.

VII. The evidence was sufficient for the Jury to find, that the defendants had knowledge, actual or constructive, that Bates was a purchaser of the property, and of the policy.

That Bates had some interest is clear from the direction in the indorsement by Philbrick, that the amount insured, in case of loss, was to be paid to Bates.

The policy was sent by Bates, through Reed and Hastings, to the defendants for their approval of, and consent to, the indorsement of Philbrick.

The defendants, by the express terms of the policy, agreed that it should continue for the benefit of a purchaser if they were advised and consented. When the policy was presented for their consent, they made no inquiry in relation to the title or interest of Bates. They returned and redelivered the policy as a subsisting and operative instrument.

The defendants are chargeable with knowledge, that Philbrick, under the policy, had no right to request their consent to pay the loss to Bates, unless he was in fact the purchaser.

They had actual knowledge, that Philbrick, by the terms of the policy, had a right in the event of a sale, to require a return of a portion of the premium, or to have the policy continued for the benefit of the purchaser. Philbrick did not request a return of premium, but that the sum insured, in the event of loss, should be paid to Bates.

The defendants having consented, without inquiry, to the indorsement of Philbrick, and becoming parties thereto, are chargeable with knowledge of the contract between Philbrick and Bates, in the execution of which the indorsement was made.

C. B. GOODRICH,
For Plaintiff in Error.

Edward C. Bates

v

Equitable F. & M. Ins

Brief of Def'n

Supreme Court of the United States.

DECEMBER TERM, A. D. 1869.

FROM RHODE ISLAND DISTRICT.

EDWARD C. BATES, Plaintiff in Error, *vs.* THE EQUITABLE FIRE AND MARINE INS. CO.

No. 183.

Defendant's Brief.

The Defendant corporation October 11th, 1861, insured William D. Philbrick, of Boston, Mass., $3000 against any loss by fire, that might accrue to him on certain sugars then owned by him.

The Policy, among other provisions, contained these contracts, viz.: That "if said property should *be sold or conveyed without the consent of said Company*, in whole or in part, then and in every other such case, this Policy shall become void."

"And this Company agree that if the assured shall sell the aforesaid property or any part thereof before the expiration of this Policy, a proportion of the premium received shall be repaid, *upon receiving notice of such sale before a loss happens*, reserving however three months premium on the sum insured over and above the amount which would be due at the time of receiving such notice; or the Policy may continue for the benefit of *such* purchaser if this Company give their consent thereto, to be evidenced by a certificate of the fact or by an endorsement on this policy."

On the 23d of November, A. D. 1861, Bates, the Plaintiff became owner by purchase and delivery of all said insured property, and the Policy was delivered to him by Philbrick, endorsed as follows:

BOSTON, Nov. 23d, 1861.

Payable in case of loss to Edward D. Bates.

W. D. PHILBRICK.

On the 28th of November, 1861, the Plaintiff (through Reed and Hastings, insurance brokers,) sent the Policy to the Defendant requesting them to approve of the indorsement thereon.

The Defendent corporation by their Secretary underneath the above indorsement made the following indorsement:

"Consent is hereby given to the above indorsement,

EQUITABLE INSURANCE CO.,

Fred W. Arnold, Secretary.

And same day returned the Policy to said brokers accompanied by a letter simply saying, "Herewith please find Policy 700, indorsement."

The Defendant corporation never had any notice of the sale of said property by Philbrick, and did not know of the sale till after its destruction by fire, which took place February 24th, 1862, and of course, gave no assent to such sale, unless such notice and consent are presumption of law from these indorsements.

On the 25th of February, 1862, Plaintiff gave Defendant notice of the destruction of said property by fire and claimed a total loss. On the 27th, Defendant admitted notice of the destruction of said insured property but declined to pay, for the reason that Philbrick, long before the destruction of said property, without any notice to or consent from said Company, had sold and conveyed it to Defendant, and at time of fire had no interest therein.

Such being the undisputed facts the Defendant at close of evidence requested the Court to direct the jury to find a verdict for Defendant, with which request the Court complied, and a verdict was rendered accordingly.

Defendant says that the direction of the Court was correct, because

POINT I.

When Insurance Policies contain provisions like the one above recited, viz.: "That on a sale, without the consent of the insurer, of the property covered thereby, the Policy shall become void," no recovery can be had in any action on such policy, when the property has been sold without such consent.

Carpenter vs. The Providence Washington Ins. Co. 16 Peters, 502-3.
Grovesnor vs. The Atlantic Fire Ins. Co., 17, N. Y. 393-4.

And the contract created by such a clause is enforced with great strictness, not permitting a recovery on the Policy when sales have been made, though by one co-partner to another, by one joint tenant or tenant in common to a co-tenant, by a master under a degree in Chancery, by Bankrupts to their assignees in Bankruptcy. And even a joint sale by the owner of the Equity of redemption and the mortgagee to whom the Policy has been made payable in case of loss, to a third party, has been held to render the Policy void.

Finley & others vs. The Lycoming M Ins Co 30 Penn, (6 Casey) 311.
Dix and others vs. Mercantile Ins. Co., 22, Ill., 272.
Foster vs. The Equitable Ins. Co., 2 Grey, 216.
The Mt. Vernon Mf'g Co., vs. The Summitt County M. F. Ins. Co., 10 Ohio, 347.
McLaren vs. The Hartford Fire Ins. Co., 1 Selden, 151.
Howard & Ryckman vs. The Albany Ins. Co., 3 Denio, 301.
Murdock vs. Ganett vs. The Chenango M. F. Ins. Co., 2 Comstock, 210.
Adams vs. Rockingham, M. F. Ins. Co., 29 Me. 293.

The uncontradicted evidence in the cause at Bar, shows that Philbrick sold the property covered by the Policy without the knowledge and without the actual consent of the insurers.
See Record p. 27, 31.

The only ground then upon which the plaintiffs can claim to recover, is that, by the application to them to approve Philbricks' endorsement on the Policy, they received constructive or presumptive notice of the sale of the property, and that by their approval of that indorsement, the Company gave constructive or presumptive consent to such sale of the property. And such, it would seem is the extent of Plaintiff's claim, but

POINT II.

The words of the endorsement, viz.: payable in case of loss to Edward C. Bates, do not import or convey any *notice of sale of the property*, cover-

ed by the Policy; neither do those words and the additional indorsement taken together or separately import or convey a consent to a sale of the property. They do not even amount to an assignment of the Policy but simply make Bates an appointee, to whom they agree the money shall be paid if a loss happens to Philbrick, according to the provisions of the Policy.

Fogg vs. The Middlesex Mf'g. Co., 10 Cush, 346.
Hale vs. The Mechanics' M. F. Ins. Co., 6 Grey, 169.
Loring vs. The Manufacturer's Ins. Co., 8 Grey, 28, 29-30.
Young and another vs. The Eagle Fire Ins. Co., 14 Grey, 153.
State Mutual Fire Ins. Co., vs. Robert 31 Penn. State, 438.
Grovesnor vs. The Atlantic Ins. Co., 17 N. Y., 394, 401.
Ketchum vs. Protective Ins. Co., 1 Allen, N. B., 136.

It need not be mentioned that no loss to Philbrick ever happened.

POINT III.

The other provision contained in said policy,—"that if the assured shall sell the aforesaid property or any part thereof before the expiration of this Policy, a proportion of the premium shall be repaid upon receiving *notice of said sale before a loss happens*, reserving, however, three months premium on the amount insured over and above the amount which would be due at the time of receiving such notice, or the Policy may continue for he benefit of such *purchaser* if this Company give their consent thereto, to be evidenced by a certificate of the fact or by endorsement on this Policy," does not vary or waive the requirement, that notice of the sale of the property covered by the Policy shall be given to the Company and their consent thereto be obtained, in order to preserve the validity of the contract. Such notice before a loss happens, and consent given, to the continuance of the Policy for the benefit of *such* purchaser is still an indispensable pr-requisite to its validity.

No such notice, actual or constructive, as we have already shown, was ever given to the insurer, and there can be no consent without knowledge of the matter to be consented to.

POINT IV.

is of no importance, to the decision of this case, whether the indorse- made by Philbrick is a complete or incomplete instrument or whether evidence to explain it is or is not admitted. These were trans- ns between Philbrick and Bates, and cannot affect the liability of the rwriters under their policy unless notice of the sale of the property red by the Policy was brought home to the insurers, and their consent to obtained before a loss.

before remarked, there was no such notice or consent, actual or con- tive, and hence the ruling of the court was correct, and there must be ment on the verdict.

William H. Potter
George H. Browne
for Defendant in Error.